Supreme Court, U.S.
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In The Supreme Court of the United States

ANR COAL COMPANY, INCORPORATED,
Petitioner,

v.

COGENTRIX OF NORTH CAROLINA, INCORPORATED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

Should an arbitration award be vacated under section 10(a) of the Federal Arbitration Act if the contractually agreed upon procedures for selecting an arbitrator are not followed?

Does an arbitrator's violation of a duty to disclose, per se, establish "evident partiality," one of the grounds for vacating an arbitration award under the Federal Arbitration Act, or must there be an additional showing of bias and improper motive?

DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner ANR Coal Company, LLC[1] makes the following disclosures pursuant to this Court's Rule 29.6:

1. The membership interests of ANR Coal Company, LLC, a Delaware limited liability company, are held by American Natural Resources Company, a Delaware corporation, and The Coastal Corporation, a Delaware corporation.

2. ANR Coal Company, LLC is a member of Coastal Coal - West Virginia, LLC, a Delaware limited liability company; the other member is American Natural Resources Company.

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[1] On July 21, 1998, ANR Coal Company, LLC filed a Certificate of Amendment changing its name to Coastal Coal Company, LLC. For purposes of this petition, the name ANR Coal Company, LLC will continue to be used.

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Petitioner ANR Coal Company, LLC ("ANR") hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit which reversed the decision of the United States District Court for the Western District of North Carolina, Charlotte Division, and reinstated the arbitration award.

OPINIONS BELOW

In its Memorandum and Order dated April 15, 1998, the United States District Court for the Western District of North Carolina, Charlotte Division, vacated the arbitration award entered in this case under section 10(a) of the Federal Arbitration Act, ruling that the contractually mandated arbitrator selection process had been violated. The Memorandum and Order is not reported and is included in the Appendix at 17.

In an opinion dated April 1, 1999, the United States Court of Appeals for the Fourth Circuit reversed the decision of the district court and remanded for entry of judgment reinstating the arbitration award. The Fourth Circuit opinion is reported at 173 F.3d 493 (4th Cir. 1999) and is included in the Appendix at 1.

On April 27, 1999, the Fourth Circuit denied ANR's Petition for Rehearing and Rehearing En Banc. The April 27, 1999 order is not reported and is included in the Appendix at 28.

On July 7, 1999, the district court ruled on ANR's Motion to Vacate Judgment, denying the motion; however, the court sua sponte stayed the judgment pending final resolution of this petition, because the court "continues to believe that the arbitration award should be vacated" and that the Fourth Circuit erred. The July 7, 1999 order is not reported and is included in the Appendix at 29.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit sought to be reviewed by this petition was entered on April 1, 1999. The Fourth Circuit entered its order denying ANR's Petition for Rehearing and Rehearing En Banc on April 27, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

At issue here is the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16, which embodies the public policy of recognizing agreements to resolve disputes through arbitration, and provides for enforcement of the parties' agreed upon procedures for conducting the arbitration.

Section 2 of the FAA provides that the parties' agreement to submit disputes to arbitration is enforceable, as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added).

Section 4 of the FAA emphasizes that arbitration is to proceed in the manner provided for in the parties' agreement to arbitrate, as follows:

> [U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added).

Section 5 of the FAA again emphasizes the enforcement of the parties' contract, this time specifically noting:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . . .

9 U.S.C. § 5 (emphasis added).

Section 10 of the FAA outlines the statutory grounds for vacating an arbitration award, as follows:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> > (1) Where the award was procured by corruption, fraud, or undue means.

> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (emphasis added).

STATEMENT OF THE CASE

Despite the fact that the arbitrator in this case was selected in violation of the parties' contractually agreed upon procedures, the Fourth Circuit refused to affirm the ruling of the district court vacating the resulting arbitration award.

This Court is presented with the public policy issue of whether parties to an agreement are entitled to rely on the enforceability of their arbitration agreement.

A. The Contractually Agreed Upon Arbitrator Selection Process.

ANR and Cogentrix of North Carolina, Inc. ("Cogentrix") agreed to arbitrate their disputes pursuant to the Commercial Arbitration Rules of the American Arbitration Association (the "AAA Rules"). Those Rules provided a mechanism for the appointment of the arbitrator, and under section 5 of the FAA, the parties were obliged to adhere to the requirements of that mechanism.

Rule 19 of the AAA Rules provides that the AAA will rule on challenges for cause and implicitly empowers the AAA to make inquiry of a prospective arbitrator so that the necessary facts to rule on the challenge for cause are known to the AAA. Further, Rule 19 requires an arbitrator to disclose any additional circumstance likely to affect impartiality. In addition, each party had three peremptory strikes that allowed it to strike a proposed arbitrator for any reason whatsoever.

Prior to exercising its peremptory strikes, respondent Cogentrix challenged for cause an individual having ties with Carolina Power & Light ("CP&L"), a key player in the underlying dispute, and an individual whose law firm had filed suit against Cogentrix. ANR also challenged for cause two individuals having ties to CP&L, including the individual challenged by Cogentrix. All three of the individuals were removed based on these challenges for cause.

Subsequent individuals were added to the list as potential arbitrators, including Wilburn Brewer ("Brewer"). ANR challenged Brewer for cause, because his firm listed CP&L as a representative client.

In considering ANR's challenge of Brewer, the AAA specifically asked Brewer to disclose his firm's ties to CP&L. The specific nature of this inquiry determined the parameters of Mr. Brewer's required disclosure on this issue. Even though his firm listed CP&L as a representative client, Brewer disclosed only that his firm represented CP&L in sporadically filed electrocution cases. Based on that disclosure, the AAA denied ANR's challenge for cause, even though others with ties to CP&L had previously been removed for cause. As it turned out, Brewer's disclosures about his firm's ties to CP&L were not complete. Only after the arbitration did ANR discover that Brewer's firm represented CP&L in cases involving its core business, the delivery of electric service. To this day, the full extent of the representation of CP&L by Brewer's law firm has never been disclosed.

After ANR's failure to strike Brewer for cause, ANR was faced with exercising its peremptory challenges in a way that would enhance its ability to get an impartial arbitrator. Relying on all of the information then available to it, including Brewer's disclosures (which at the time ANR believed were complete), ANR decided not to use one of its peremptory strikes to strike Brewer, but rather to rank Brewer low on its list. However, unbeknown to ANR at this time, Brewer not only had failed to disclose the full extent of his firm's ties with CP&L, but had not disclosed that approximately ten years earlier, (1) his firm had merged for approximately one year with the firm which represented Cogentrix in the transaction at issue in the arbitration, (2) that certain members of the merged firm had had a financial interest in Cogentrix, and (3) that one of Brewer's partners in the merged firm was representing Cogentrix in the very arbitration which is the subject of this case. If disclosure of this information had been made, ANR would have struck Brewer with one of its peremptory strikes.

B. The District Court Vacated the Arbitration Award Because of the Arbitrator's Violations of His Disclosure Obligations.

After the arbitration award was entered in favor of Cogentrix, ANR learned for the first time that Brewer's disclosures were incomplete. ANR sought to have the arbitration award vacated because the contractually agreed upon AAA arbitrator selection process was not followed. ANR invoked the jurisdiction of the United States District Court for the Western District of North Carolina, Charlotte Division, pursuant to 28 U.S.C. § 1332.

The district found under Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), that "an arbitrator's nondisclosure of facts showing a potential conflict of interest creates 'evident partiality' warranting vacatur even when no actual bias is present." (A. 23). The district court concluded that Brewer had violated his disclosure obligations, and under Commonwealth, vacatur of the arbitration award was warranted under section 10(a) of the FAA.

In coming to this conclusion, the district court found that the arbitrator made untimely and inaccurate disclosures about his and/or his firm's relationships with CP&L, Cogentrix and Cogentrix' law firm. He continued that it was reasonable to believe that, had ANR known the undisclosed facts, ANR "would have used a peremptory challenge to strike Brewer as the neutral, and/or would have objected to him for cause following his selection." (A. 26). The incomplete disclosure as to CP&L led the district court to comment that such "raises the possibility, if not the likelihood, that his firm has represented CP&L in other matters and cases which have not resulted in reported decisions." (A. 25 n.4).

In short, the district court held the arbitrator selection process was not followed as agreed, and, as a result, the

arbitration award must be vacated. In its most recent Order, the district court reiterated its belief that the arbitration award should be vacated. (A. 30).

C. The Fourth Circuit's Opinion Reversed the District Court's Vacatur.

In an opinion dated April 1, 1999, the United States Court of Appeals for the Fourth Circuit reversed the ruling of the district court, and remanded the case with instructions to the district court to reinstate the arbitration award. (A. 16).

The Fourth Circuit's opinion ruled that (1) a violation of the contractually agreed upon AAA procedural rules would not by itself be grounds for vacating the award, (2) the arbitrator had not violated any disclosure obligations, because the arbitrator's relationships with CP&L, Cogentrix, and/or Cogentrix's counsel were "trivial," and therefore inherently could not constitute "circumstance[s] likely to affect impartiality" under AAA Rule 19, and (3) ANR had not presented sufficient evidence to show bias and improper motive to satisfy the court's test for "evident partiality," the only ground analyzed by the court under the FAA for vacating the award. (A. 2-16).

The Fourth Circuit's opinion does not explain how the relationships at issue could be "trivial" when there was not, and never has been, complete disclosure by the arbitrator of the extent of these relationships. Nor does the Fourth Circuit's opinion address how the relationship between Brewer's firm and CP&L could be "trivial" when the AAA earlier disqualified two individuals having ties to CP&L.

The court's opinion ignores the effect that the inadequate and untimely disclosures had on ANR's right to exercise peremptory strikes, and to have the AAA rule on ANR's challenge for cause after receiving a complete response to the AAA's request for disclosure. The Fourth Circuit completely ignores the district court's finding that

ANR reasonably would have exercised a peremptory challenge to strike Brewer if ANR had received the undisclosed information.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION.

The Fourth Circuit's opinion directly conflicts with the principles enunciated in this Court's opinions in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995), and Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Jr. Univ., 489 U.S. 468 (1989), which hold that the parties' arbitration agreement, including the agreed upon procedural rules, should be rigorously enforced according to their terms, and that violation of the parties' arbitration agreement constitutes grounds to vacate the resulting arbitration award. In addition, the Fourth Circuit's opinion misconstrues this Court's opinion in Commonwealth Coatings Corp., overlooking the fact that this Court held in Commonwealth Coatings that an arbitration award should be vacated for violation of a disclosure obligation, whether or not there is showing of bias or improper motive. Similarly, a split has developed among the Courts of Appeals as to whether violation of the parties' agreed upon arbitration procedural rules, including the arbitrator selection process, requires vacatur of the resulting arbitration award absent a showing of bias or improper motive.

II. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S OPINIONS ESTABLISHING THAT VIOLATION OF A PARTY'S RIGHTS TO CONTRACTUALLY AGREED UPON ARBITRATION PROCEDURES REQUIRES VACATION OF THE RESULTING ARBITRATION AWARD.

In direct conflict with the district court's opinion, the Fourth Circuit determined that violations of the governing AAA procedural rules alone, were not a basis for vacating the arbitration award. Specifically the Fourth Circuit stated that, "although the AAA rules provide significant and helpful regulation of the arbitration process, they 'are not the proper starting point for an inquiry into an award's validity.'" (A. 9 (quoting Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 677 (7th Cir. 1983))). The Fourth Circuit concluded that, as a matter of law, a violation of procedural rules, "in and of itself, provides no basis to vacate an award." (A. 2).

The holding of the Fourth Circuit is in conflict with the FAA which, among other things, is intended to ensure that private agreements to arbitrate are enforced according to their terms. 9 U.S.C. §§ 2, 4, 5; see also Mastrobuono, 514 U.S. at 53-54; Volt Info. Sciences, Inc., 489 U.S. at 479. Only by rigorous enforcement of arbitration agreements according to their terms can the policy of encouraging resolution of disputes through arbitration be further enhanced. Parties to contracts need to be assured that their negotiated arbitration agreements, fashioned to specifically address their needs, will be enforced, and that such agreements will neither be ignored nor refashioned by the court.

This Court in Volt Info. Sciences, Inc. held that failure to enforce the parties' agreement to arbitrate according to the parties' agreed procedural rules

> would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by [certain rules] of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . . By permitting the courts to 'rigorously enforce' such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.

Volt Info. Sciences, Inc., 489 U.S. at 479 (citations omitted) (emphasis added). Although the Volt Court did not deal with whether an arbitration award should be vacated, and is thus factually distinguishable, Volt holds that the obligation to enforce agreements to arbitrate extends specifically to the enforcement of agreed upon procedural rules.

In turn, Mastrobuono implicitly recognizes that a violation of the right to have an arbitration agreement enforced according to its terms is properly remedied under the Federal Arbitration Act by vacating the award entered in disregard of the parties' agreement. See Mastrobuono, 514 U.S. at 58. In Mastrobuono, the district court vacated an arbitration award, holding that the arbitrators exceeded their power under section 10(a)(4) of the FAA when they awarded punitive damages contrary to the parties' contract. The

Seventh Circuit affirmed. See Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713, 716 (7th Cir. 1994). Without discussing the applicable subsection of section 10(a) of the FAA, this Court analyzed the appropriateness of the district court's vacatur of the arbitration award, and determined that the question came down "to what the contract has to say about the arbitrability of petitioners' claim for punitive damages." Mastrobuono, 514 U.S. at 58. This Court found the parties' contract did not eliminate the right to an award of punitive damages and reinstated the arbitration award.

Consistent with Mastrobuono, the Fourth Circuit should have (1) determined the rules the parties' arbitration agreement imposed upon the arbitrator selection process; (2) determined if the rules had been followed; and (3) if the rules have not been followed, vacated the award as the remedy for insuring the enforcement of the parties' agreement. The district court applied that analysis, finding that because the arbitrator never completely disclosed his firm's relationship with CP&L, and did not timely and/or fully disclose his prior relationship with either Cogentrix or its counsel, the arbitrator violated his disclosure obligations. Furthermore, because of the incomplete and untimely disclosures, the district court concluded that, ANR had been deprived of its right to exercise its peremptory challenges, and the AAA was unable to meaningfully rule on challenges for cause. The district court concluded that because the parties' contractual selection process had been violated, the appropriate remedy was to vacate the arbitration award.

The Fourth Circuit rejected the district court's analysis and holding. Among other things, the Fourth Circuit's opinion did not address ANR's contractual right to exercise peremptory strikes, and to have the AAA meaningfully rule on challenges for cause after full disclosure. Having failed to make the Mastrobuono analysis, and having concluded that violation of the AAA Rules,

themselves, do not provide a basis for vacating an arbitration award, the Fourth Circuit's opinion is in conflict with both Mastrobuono and Volt, and contrary to the intent of the FAA. The Fourth Circuit's opinion should be reversed.

III. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S HOLDING IN COMMONWEALTH COATINGS THAT A VIOLATION OF A MANDATED DISCLOSURE OBLIGATION WILL, PER SE, ESTABLISH "EVIDENT PARTIALITY" AND BE GROUNDS FOR VACATING AN ARBITRATION AWARD.

The Fourth Circuit applied a test for evident partiality that is contrary to this Court's precedent in Commonwealth Coatings. The Fourth Circuit erroneously held that a party challenging an arbitration award may only have the award set aside on the ground of evident partiality by presenting sufficient evidence to show bias and improper motive. (A. 12-16). Thus, according to the Fourth Circuit's opinion, failure of an arbitrator to disclose relevant information could never be a violation of section 10 of the FAA, per se, even if the nondisclosure violated the parties' contractual rights.

Commonwealth Coatings is the seminal decision on the appropriate standard for vacating an arbitration award in cases involving violation of a disclosure obligation. Justice Black, in an opinion expressing the views of six members of the Court, held that the arbitration award should be vacated under section 10 of the FAA, given that the arbitrator had failed to disclose business dealings between one of the parties and the arbitrator. Commonwealth Coatings, 393 U.S. at 147-50. The disclosure duty which was found to have been violated arose from a manifest violation of the minimum disclosure obligations implied by Congress in the FAA in order to assure the integrity of the arbitration process; the disclosure obligation that was violated was not a

duty explicitly defined by the parties' agreement. Id. at 147, 149.

Justice White and Justice Marshall joined in the Court's opinion, but authored a concurring opinion to make additional remarks. Id. at 150. Justice White addressed the issue, not of whether an award should be vacated when a disclosure obligation is violated, but rather, what standard should be employed to determine the scope of an arbitrator's disclosure obligation when it is not specifically defined by the parties. Id. at 150-52. He opined that, where an arbitrator has a relevant relationship involving the parties which is "more than trivial," that fact must be disclosed. Id. at 151-52.

In Commonwealth Coatings, this Court determined it was appropriate to vacate the arbitration award on the grounds of evident partiality and undue means notwithstanding the fact that the district court expressly found that the arbitrator was "entirely fair and impartial." See 393 U.S. at 151 n."t" (White, J. concurring). There was no claim of actual bias, or suspicion of improper motive, only a claim of nondisclosure. See id. at 147. Simply stated, under Commonwealth Coatings, no evidence of an asserted bias or improper motive is required to vacate an arbitration award on grounds of evident partiality if an arbitrator has violated his disclosure obligations. Id. at 147, 149-50, 151-52.

Because the arbitrator in this case failed to disclose information expressly requested by the AAA in considering ANR's challenge for cause, he violated the disclosure obligations imposed upon him by the AAA Rules. As a result, the arbitration award should have been vacated under Commonwealth Coatings without a showing of bias or improper motive. This Court should grant this petition to correct the Fourth Circuit's erroneous articulation of the legal standard applicable in determining evident partiality in

cases involving violation of contractually mandated disclosure obligations.

IV. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Fourth Circuit's opinion is representative of a split among the Courts of Appeals regarding the application of Commonwealth Coatings. The split arises from confusion engendered in large part from the additional remarks authored by Justice White. Despite the fact that Justice White and Justice Marshall joined in the opinion of Justice Black, some circuits fail to recognize the precedential effect of Justice Black's opinion, or give Justice White's opinion particular weight. (A. 9 n.3). Those circuits fail to acknowledge the basic holding of Commonwealth Coatings, that violation of a disclosure obligation is grounds per se for vacating an arbitration award under the FAA. Rather, they hold, as did the Fourth Circuit, that a violation of a disclosure obligation by itself is insufficient to vacate an arbitration award, and that, in order to satisfy vacating an award, there must also be an additional showing of bias and/or improper motive. See, e.g., Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2nd Cir. 1984); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989); see also Al-Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir. 1996)("We agree with the Fourth Circuit that . . . claimant must establish specific facts that indicate improper motive on the part of an arbitrator."). These courts fail to recognize that when Justice White made his remarks, he was not undercutting the basic holding articulated by Justice Black, but rather was trying to more clearly articulate standards for determining the parameters of otherwise undefined disclosure obligations.

On the other hand, several circuits have held that a failure to follow the parties' agreed upon arbitration rules and disclosure requirements constitutes per se grounds for vacating the resulting arbitration awards under the FAA. See, e.g., Schmitz v. Zilveti, 20 F.3d 1043, 1047-48 (9th Cir. 1994) (court vacated arbitration award for failure to follow agreed upon disclosure rules even though there was no evidence that the arbitrator even knew about the undisclosed relationship); Olsen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159-60 (8th Cir. 1995) (court vacated arbitration award for failure to disclose indirect relationship with no showing of bias or improper motive); and Rogers v. Schering Corp., 165 F. Supp. 295, 299-301 (D.N.J. 1958) (court vacated arbitration award based on failure of AAA to disclose relationships disclosed by arbitrator to AAA contrary to AAA Rules), aff'd, 271 F.2d 266 (3rd Cir. 1959)(decided before Commonwealth Coatings).

The Fourth Circuit attempts to reconcile its holding with these cases by stating that the availability of vacatur in the Rogers, Schmitz and Olsen cases was linked to some showing of actual arbitrator partiality. Nonetheless, the findings of these courts supporting vacatur of the arbitration awards were based solely on violations of the agreed upon rules and disclosure requirements, and not based on evidence of bias or improper motive of an arbitrator. This Court should grant this petition in order to reconcile this conflict in decisions of the United States Courts of Appeals arising from the application of this Court's Commonwealth Coatings opinion.

CONCLUSION

For the reasons outlined herein, ANR respectfully requests the Court to grant this petition.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANR COAL COMPANY, INCORPORATED,
Plaintiff-Appellee,

v.

COGENTRIX OF NORTH CAROLINA,
INCORPORATED,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Carl Horn, III, Chief Magistrate Judge.
(CA-98-19-3-H)

No. 98-1753

Argued: January 26, 1999
Decided: April 1, 1999
Entered April 1, 1999

Before ERVIN, MOTZ, and TRAXLER, Circuit Judges.

Reversed and remanded by published opinion. Judge Motz wrote the opinion, in which Judge Ervin and Judge Traxler joined.

COUNSEL

ARGUED: John G. Kester, WILLIAMS & CONNOLLY, Washington, D.C., for Appellant. Barbara Kathryn Polich, PARSONS, BEHLE & LATIMER, Salt Lake City, Utah, for Appellee. **ON BRIEF:** James T. Fuller, III, Julia B. Shelton, WILLIAMS & CONNOLLY, Washington, D.C., for Appellant. Lee A. Spinks, Cynthia V. McNeely, POYNER & SPRUILL, L.L.C., Charlotte, North Carolina, for Appellee.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

The magistrate judge in this case vacated an arbitration award, finding that the arbitrator's failure to reveal certain matters violated his "duty to disclose." Because an arbitrator's failure to disclose, in and of itself, provides no basis to vacate an award, and because the facts here do not demonstrate evident partiality by the arbitrator, we must reverse.

I.

This dispute arises from a coal sales contract between Cogentrix of North Carolina, Inc. and Coastal Coal Sales, Inc., the predecessor in interest of ANR Coal Company, Inc. (collectively "ANR"). Under this contract, Cogentrix agreed to purchase coal from ANR for Cogentrix's Southport, North Carolina facility. Cogentrix used the coal to generate electric power, which it, in turn, sold to Carolina Power & Light Co. Originally, Carolina Power agreed to purchase all of the electric power generated at the Cogentrix Southport facility. Cogentrix and Carolina Power renegotiated their agreement, however, to provide that Carolina Power was no longer obligated to purchase all of the electric power generated at that facility. For this reason, Cogentrix determined that it

would have to reduce its electrical power output and, accordingly, sought to decrease its coal purchases from ANR. Asserting that Cogentrix's attempt to reduce its purchases of coal violated the coal sales contract, ANR initiated arbitration to resolve the dispute.

The coal sales contract between Cogentrix and ANR permitted each party to select one arbitrator, with the final arbitrator to be chosen by the other two arbitrators. Cogentrix and ANR each selected an arbitrator, but initially those arbitrators could not agree on a neutral third arbitrator. In accordance with the American Arbitration Association (AAA) Commercial Arbitration Rules, the AAA provided the parties with the names and qualifications of ten potential neutral arbitrators. Each side had three preemptory strikes and could also make challenges for cause. ANR objected to the list as too heavily weighted toward the utility industry, and specifically objected for cause to two potential arbitrators on the list. The AAA struck those two names from the list, as well as one name to which Cogentrix objected, and replaced them with three new names, including Wilburn Brewer, a partner at the Columbia, South Carolina law firm of Nexsen, Pruet, Jacobs & Pollard.

ANR then asked that Brewer be removed from the list for cause because his law firm represented Carolina Power. The AAA refused to take Brewer off the neutral list explaining that, although Brewer's firm represented Carolina Power in "electrocution cases . . . which are sporadically filed," Brewer himself "never personally represented" Carolina Power. ANR used its three preemptory strikes, but chose not to strike Brewer. Each party then ranked the ten potential neutral arbitrator candidates; Brewer, the individual with the highest average ranking, was chosen as the neutral arbitrator.

In its December 19, 1996 letter announcing Brewer's selection as the neutral arbitrator, the AAA listed the following disclosures by Brewer:

> In 1987, his firm merged with Moore & Van Allen [the firm representing Cogentrix at arbitration and on appeal] and then separated in 1988. During 1988, Mr. Brewer was ill with leukemia and not actively practicing law or involved with the firm. Through this temporary merger, Mr Brewer knows Mr. Davis [counsel in this matter for Cogentrix].
>
> Mr. Brewer is confident that this will not affect his ability to impartially hear and determine this dispute.
>
> Unless we are advised to the contrary by January 15, 1997, we will assume that the Parties waive any presumption of bias by the Arbitrator based on this disclosure.

ANR did not renew its request to remove Brewer.

Two months later, on February 13, 1997, the AAA sent a letter to the parties addressing scheduling; an enclosure in that letter included another, similar disclosure signed by Brewer and again stated that the failure of a party to respond by a certain date (February 24) would constitute a waiver of any presumption of bias based on the disclosure. Again, ANR did not renew its request to remove Brewer. ANR maintains that it declined to object to Brewer because "[g]iven there was no assurance the challenge would be granted, a failed challenge could potentially offend the `neutral' arbitrator as a challenge to his integrity."

The arbitrators ruled 2-1 for Cogentrix, with Brewer in the majority. ANR contends that, after the arbitration award, it learned that Brewer's law firm had represented Carolina Power in cases involving the utility's right to deliver electric service, "contrary to the earlier disclosures . . . that his firm only represented [Carolina Power] in electrocution cases." Furthermore, ANR learned that Moore & Van Allen,

the law firm that represented Cogentrix in the arbitration, had also represented Cogentrix in 1988 when Moore & Van Allen was merged with Nexsen Pruet, and that in 1983 certain attorneys at Moore & Van Allen had loaned money to Cogentrix in consideration for stock warrants in the company.

ANR filed a civil complaint asking the court to vacate the arbitration award, which the magistrate judge promptly did.[1] We review de novo an order vacating an arbitration award. See Consolidation Coal Co. v. Local 1643, United Mine Workers of America , 48 F.3d 125, 128 (4th Cir. 1995). A district court's underlying factual findings will stand unless clearly erroneous. See id. The clearly erroneous rule, however, "does not protect findings `made on the basis of the application of incorrect legal standards.'" Id. (quoting Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1526 (4th Cir. 1984)).

ANR maintains that two rationales support vacatur of the arbitration award. We discuss each in turn.

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[1] The Federal Arbitration Act (the FAA) requires "[n]otice of a motion to vacate, modify, or correct an arbitration award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12 (1994). ANR served a civil complaint in this case, seeking to vacate the arbitration award, within three months of the filing of the award. But Cogentrix maintains that ANR's failure to serve notice of a motion to vacate "forfeits [ANR's] right to judicial review of the award." The FAA sets forth the sole method to challenge an arbitration award -- "by serving a motion to vacate within three months of the rendering of the award," Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986) -- and does not permit "a party to initiate a challenge to an arbitration award by filing a complaint." O. R. Securities, Inc. v. Professional Planning Associates, Inc., 857 F.2d 742, 745 (11th Cir. 1988). Thus ANR clearly erred by labeling its pleading a civil complaint, rather than a motion to vacate. Cogentrix, however, cannot point to any prejudice resulting from this error. No court has held that this sort of mistake forfeits a party's right to judicial review when the opposing party fails to demonstrate any prejudice. See, e.g., id. at 745 ("The liberality of the . . . Federal Rules is such that an erroneous nomenclature does not prevent the court from recognizing the true nature of a motion.") (internal quotation marks and citation omitted). We will not so hold here. Such a ruling would, as the magistrate judge observed, undeniably "elevate form over substance."

II.

First, and principally, ANR contends that Brewer's failure to disclose the full extent of his relationship to Cogentrix constitutes a basis for vacating the arbitration award. The magistrate judge apparently agreed, reasoning that Brewer violated his "duty to disclose all information regarding his present and past relations with Cogentrix and other interested parties."

Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10 (1994) (the FAA), lists the grounds that may form the basis for vacatur of an arbitration award. These include proof that an award was procured by fraud, corruption, or undue means, or resulted from an arbitrator's evident partiality, corruption, misconduct, or the like. See 9 U.S.C. §§ 10(a)(1)-(3). The statute makes no mention of an arbitrator's failure to disclose information as a basis for vacating an arbitration award.

Implicitly recognizing the lack of statutory authority for vacating an award based on a failure to disclose, ANR rests its argument on the AAA Commercial Arbitration Rules, which the coal sales contract provides govern the arbitration here.[2] Specifically, ANR contends that Brewer's failure to disclose violated AAA Rule 19 and that this violation requires vacatur of the arbitration award.

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[2] ANR also briefly relies on Canon II of the AAA Code of Ethics for Arbitrators in Commercial Disputes. Canon II states that "arbitrators should disclose the existence of interests or relationships that are likely to affect their impartiality or that might reasonably create an appearance that they are biased against one party" and should "make a reasonable effort to inform themselves of any interests or relationships described in the preceding paragraph." Even if Brewer violated Cannon II (and it is not at all clear that he did), the Code of Ethics itself forecloses any use of such a violation as a basis for vacatur. The Preamble of the Code specifically states that "it does not form part of the arbitration rules of the [AAA]" and "does not establish new or additional grounds for judicial review of arbitration awards."

Rule 19 provides:

> Any person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

AAA Commercial Arbitration Rule 19 (1996) (emphasis added). The language of this Rule does not require a potential arbitrator to disclose every interest or relationship with a party that could conceivably be regarded as a basis for bias. Rather, it only requires disclosure of an interest or relationship "likely to affect impartiality." Even so, ANR contends that Rule 19 imposes a "mandatory nondiscretionary" disclosure duty on an arbitrator, that Brewer violated this duty, and that this violation requires vacatur of the arbitration award.

ANR relies heavily on Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968). There, the petitioner failed to demonstrate actual bias, but the Supreme Court nonetheless vacated the arbitration award because the "neutral" arbitrator, an engineering consultant, did not reveal that one of his regular customers was a party in the arbitration. Id. at 146. Although the Commonwealth Coatings Court explicitly stated that the statutory "evident partiality" ground, 9 U.S.C. § 10(a)(2), provided the basis for its decision, it suggested that arbitrators may have the same disclosure and recusal obligations as Article III judges. 393 U.S. at 147-48. Moreover, the Court noted that "[w]hile not

controlling" in the case before it (presumably because the parties did not agree to be governed by the AAA Rules) what is now AAA Rule 19 (then Rule 18) was "highly significant," because the rule demonstrated that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." Id. at 149. ANR thus reads Commonwealth Coatings as recognizing that the "failure to comply with a mandatory obligation to disclose all possible conflicts," assertedly like that imposed by AAA Rule 19, provides "a proper basis under the FAA for vacating an award."

ANR misinterprets Commonwealth Coatings. In that case, the Supreme Court made its strong statements as to the importance of disclosure in a context far different from that involved here. In Commonwealth Coatings, the arbitrator had kept secret "a repeated and significant" relationship that existed "over a period of four or five years" with one of the parties, which resulted in the party paying the arbitrator $12,000 in professional fees. 393 U.S. at 146. Moreover, even in the face of these facts, the Supreme Court did not suggest that an arbitrator has a duty to reveal "all information regarding his past or present relations with" a party, as the magistrate judge did here.

Rather, the Commonwealth Coatings Court observed that a less onerous obligation sufficed: "[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." Id. at 149 (emphasis added). Furthermore, Justice White, joined by Justice Marshall in concurrence, agreed that an arbitrator need not "provide the parties with his complete and unexpurgated business biography." Id. at 150 (White, J., concurring). Instead, "it is enough .. . to hold, as the Court does, that where an arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed." Commonwealth Coatings, 393 U.S. at 151 (White, J.,

concurring) (emphasis added). Justice White explained that subjecting arbitrators to extremely rigorous disclosure obligations would diminish one of the key benefits of arbitration: an arbitrator's familiarity with the parties' business. Id. at 150 (recognizing that it is "because [arbitrators] are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function").[3]

Failure to disclose the sort of attenuated, nonsubstantial relationships at issue here violates neither the teaching of Commonwealth Coatings nor AAA Rule 19. As Judge Posner (citing Justice White's concurrence) observed in a similar situation, to hold that Rule 19 "requires disclosure of every former social or financial relationship with a party or a party's principals" would make it "impractical for persons in the business world to be arbitrators, thereby depriving the parties of the services of those who might be best informed and qualified to decide particular types of cases." Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 677 (7th Cir. 1983).

Even if Brewer's failure to disclose had violated Rule 19, that would not, by itself, require or even permit a court to nullify an arbitration award. When parties agree to be bound by the AAA rules, those rules do not give a federal court license to vacate an award on grounds other than those set forth in 9 U.S.C. § 10. Thus, although the AAA rules provide significant and helpful regulation of the arbitration process, they "are not the proper starting point for an inquiry into an award's validity." Merit, 714 F.2d at 677. Rather, in determining whether to set aside an arbitration award, a court

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[3] Because the vote of either Justice White or Justice Marshall was necessary to create a majority, courts have given this concurrence particular weight. See, e.g., Peoples Security Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993); Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82-83 (2d Cir. 1984); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 682 (7th Cir 1983). Yet ANR totally ignores it.

may only consider whether the complaining party has demonstrated a violation of the governing statute. See Consolidation Coal, 48 F.3d at 130 n.5; Hobet Mining, Inc. v. International Union, United Mine Workers of America, 877 F. Supp. 1011, 1015-19 (S.D.W.Va. 1994). The material and relevant facts an arbitrator fails to disclose may demonstrate his "evident partiality" under 9 U.S.C. § 10(a)(2). However, nondisclosure, even of such facts, has no independent legal significance and does not in itself constitute grounds for vacating an award.

None of the cases upon which ANR relies hold to the contrary. Health Services Management Corp. v. Hughes, 975 F.2d 1253 (7th Cir. 1992), and Rogers v. Schering Corp., 165 F. Supp. 295 (D.N.J. 1958), aff'd, 271 F.2d 266 (3d Cir. 1959), involve the AAA's violation of Rule 19 by failing to disclose certain critical information about the arbitrator's conflicts to the parties. The Rogers court held, and the Health Services court stated in dicta, that the AAA's failure to reveal these vital facts will provide a basis for vacatur when this nondisclosure produces an award by a partial arbitrator and so violates 9 U.S.C. § 10(b). Nor do Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994), or Olsen v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1995), assist ANR. Those courts simply concluded that under the circumstances presented to them, the arbitrator's failure to disclose critical facts did demonstrate his evident partiality under 9 U.S.C. § 10(a)(2).[4] ANR has failed to cite a

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[4] The Schmitz court also stated that an arbitrator may have an "enhanced duty to investigate" potential facts that might be relevant to his bias, but this was in the context of an arbitration conducted under the more demanding rules of the National Association of Security Dealers, which require an arbitrator to "make such an investigation regarding the actual parties to th[e] arbitration." 20 F.3d at 1048. The AAA rules contain no similar requirement; the AAA Code of Ethics does provide an investigation directive (albeit a less strict one) but, by its own terms, the Code provides no basis for vacatur. See supra n.2. Nor does an arbitrator have some general "enhanced duty" to investigate. See Al-Harbi v. Citibank, N.A., 85 F.3d 680, 682 (D.C. Cir. 1996) (finding "no source for any such generalized duty"). Of course, if an arbitrator fails to investigate facts that come to light after the award, and those facts are not trivial, the aggrieved party

single case holding that a failure to disclose in violation of the arbitration rules constitutes an independent basis for vacatur absent proof that, in addition, the nondisclosure proves one of the statutory grounds for vacatur.

Not only does precedent thus compel our rejection of ANR's contention, but sound policy also counsels this result. Parties value commercial arbitration, at least in part, because they "prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter." Merit, 714 F.2d at 679; see also Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds , 748 F.2d 79, 83 (2d Cir. 1984) ("parties agree to arbitrate precisely because they prefer a tribunal with expertise regarding the particular subject matter of their dispute"). The approach proposed by ANR would permit a "disgruntled party" to seize upon an undisclosed relationship "as a pretext for invalidating the award." In re Andros Compania Maritima, S.A., 579 F.2d 691, 700 (2d Cir. 1978). Under such a rule, an arbitration award could be vacated due to an arbitrator's failure to disclose a trivial fact even though that fact, if known prior to the arbitration, would not have enabled the losing party to have the arbitrator removed for cause. Such a system would undermine the parties faith in commercial arbitration and make the task of finding qualified arbitrators "exceedingly burdensome." Peoples Security Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993).

In sum, we hold that an arbitrator's failure to reveal facts may be relevant in determining evident partiality under 9 U.S.C. § 10(a)(2), but that mere nondisclosure does not in itself justify vacatur.

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may use this information to demonstrate evident partiality under 9 U.S.C. § 10(a)(2). However, if those facts do not demonstrate statutory grounds for vacatur, a failure to investigate will not provide a court with grounds to vacate the award.

III.

Alternatively, ANR maintains that Brewer's failure to disclose demonstrates his "evident partiality" and for this reason provides grounds for vacatur under 9 U.S.C. § 10(a)(2). The party seeking vacatur has the burden of proof; to meet this burden, he must demonstrate "that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration." Consolidation Coal, 48 F.3d at 129 (internal quotation marks and citations omitted).

A court should examine four factors to determine if a claimant has demonstrated evident partiality: (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding. See id. at 130. Although the magistrate judge outlined this standard, he failed to apply it properly. Instead, relying on Brewer's failure to disclose, the judge conclusorily held that "a reasonable person might conclude that Mr. Brewer might be inclined to rule in favor of Cogentrix."

In determining whether a party has demonstrated evident partiality, a court should evaluate the facts in light of each of the above four factors. When considering each factor, the court should determine whether the asserted bias is "direct, definite and capable of demonstration rather than remote, uncertain or speculative" and whether the facts are sufficient to indicate "improper motives on the part of the arbitrator." Consolidation Coal, 48 F.3d at 129. A party need not prove that the arbitrator, in fact, had improper motives. To do so would make the standard for evident partiality equivalent to proving actual bias. See id. But a party seeking vacatur must put forward facts that objectively demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives. The movant

carries a "heavy" burden, see Peoples, 991 F.2d at 146, in order to meet this "onerous" standard, see Al-Harbi, 85 F.3d at 683.

ANR contends that Brewer's failure to disclose two sets of facts demonstrates his evident partiality.[5] We apply the four-factor test to each.

First, ANR points to the representation of Carolina Power in electric service cases by Brewer's firm -- Nexsen Pruet. ANR maintains that if the arbitrators had determined that Cogentrix breached the coal sales contract, then Cogentrix would have passed the costs of this breach on to its sole customer, Carolina Power. Brewer, according to ANR, thus had a "personal interest" in finding no breach, i.e., protecting his firm's client, Carolina Power, from incurring these costs.

ANR proffered no direct or definite evidence of this personal interest; no evidence that the contractual relationship between Carolina Power and Cogentrix required, or permitted, these costs to be passed on to Carolina Power; and no evidence that even if this happened it would have affected Carolina Power's relationship with Nexsen Pruet. Furthermore, the claim that these facts demonstrate Brewer's personal interest in Cogentrix is severely undercut by ANR's pre-award willingness to accept Brewer despite its knowledge that Nexsen Pruet represented Carolina Power in electrocution cases. To be sure electrocution cases involve a different subject matter and perhaps a different expertise than electric service cases, but in both situations Carolina

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[5] Cogentrix argues that ANR waived its right to contest the impartiality of the arbitrator when it failed to assert a second challenge for cause after Brewer's initial disclosures. Normally, such a failure might preclude a party from challenging the impartiality of the arbitrator. See Cook Indus., Inc. v. C. Itoh & Co., 449 F.2d 106 (2d Cir. 1971). ANR, however, first learned of the challenged relationships after the award. Therefore, it certainly has not waived its rights to object to this information. See Morelite, 748 F.2d at 84 n.5. Furthermore, because a court must look at all relevant facts to determine evident partiality, even though ANR did not reiterate its challenge to Brewer, ANR has not waived its right to object to the cumulative effect of the information disclosed pre-award when combined with that learned post-award.

Power, the asserted indirect beneficiary of Brewer's arbitration decision, was a client of Brewer's firm, Nexsen Pruet. In sum, ANR has failed to offer evidence that Brewer had any "personal interest" in the arbitration. See Cook Indus., Inc. v. C. Itoh & Co., 449 F.2d 106 (2d Cir. 1971) (upholding award even though one arbitrator was employee of a company that had a major supply contract with party to arbitration).

Similarly, ANR has not demonstrated that Nexsen Pruet's representation of Carolina Power evidences any "direct" relationship between Brewer and Cogentrix. Nor can ANR point to any real "connection" between that relationship and the arbitration. Carolina Power was not a party to the arbitration; Nexsen Pruet's representation of the utility is thus a step removed from the arbitration proceeding. In United States Wrestling Fed'n v. Wrestling Division of AAU, Inc., 605 F.2d 313 (7th Cir. 1979), the court held that an arbitrator's connection with a non-party did not constitute evident partiality even though the non-party had a relationship with a party to the arbitration. Here the connection between Brewer, the arbitrator, and the party he is alleged to favor, Cogentrix, is even more attenuated. Brewer himself never personally represented Carolina Power. Thus, the "connection" between Brewer and Cogentrix is virtually nonexistent. The final Consolidation Coal factor, proximity in time, does favor ANR because at the time of the arbitration Nexsen Pruet represented Carolina Power. But this factor is of little significance in view of ANR's lack of proof as to the other factors.

The second series of facts upon which ANR relies dates back to 1983. At that time certain attorneys with Moore & Van Allen lent money to Cogentrix, and in exchange they received stock warrants that permitted them to acquire, collectively, a six percent equity interest in Cogentrix. Thus when Nexsen Pruet briefly merged with Moore & Van Allen in 1988, some members of the consolidated firm, which represented Cogentrix, owned a small interest in Cogentrix.

The third factor -- connection to the arbitration -- may weigh in ANR's favor in this instance because the arbitrator's merged firm assertedly once represented one of the parties (rather than an alleged third party beneficiary) and some members of that firm owned a small ownership interest in that party. The other factors, however, clearly do not.

Indeed, it is difficult to understand how the facts of this case demonstrate any "personal interest" on Brewer's part, let alone one that is direct and proximate in time to the arbitration. See Al-Harbi v. Citibank, N.A., 85 F.3d 680, 682 (D.C. Cir. 1996) (no evident partiality demonstrated by the fact that an arbitrator's former law firm had represented the prevailing party in matters unrelated to the arbitration). The brief relationship between Brewer and Cogentrix through the Moore & Van Allen merger is about as indirect and tenuous a relationship as can be imagined. ANR seems to imply that the merger proves that Brewer himself at one time represented Cogentrix or owned a share of the company. This view ignores the surrounding undisputed facts. The law firm merger of one year's duration took place ten years prior to the arbitration, at a time when Brewer was battling leukemia and not practicing law. Moreover, during the merger, Nexsen Pruet remained in Columbia while Moore & Van Allen remained in Charlotte. ANR has not alleged that any members of Nexsen Pruet personally represented Cogentrix or owned any shares of Cogentrix stock. Since Brewer was ill and not working at that time, his connection to Cogentrix is even more remote. See Ilios Shipping & Trading Corp. v. American Anthracite & Bituminous Coal Corp., 148 F. Supp. 698, 700 (S.D.N.Y. 1957) ("Something more than a vague and rather remote business relationship between the arbitrator and one of the parties to the arbitration is certainly needed if the losing party seeks to vacate the award on the ground of `evident partiality' of one of the arbitrators.") (citations omitted).

ANR has not carried its burden of proffering facts that, alone or taken together, would permit a reasonable

person to assume that Brewer was partial to Cogentrix. A trivial relationship, even if undisclosed, will not justify vacatur of an arbitration award. The facts here demonstrate nothing more than a trivial relationship between Brewer and the prevailing party, Cogentrix.

IV.

For the foregoing reasons, we reverse the magistrate judge's vacatur of the arbitration award and remand the case with instructions to reinstate the award.

REVERSED AND REMANDED

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO. 3:98CV19-H

ANR COAL COMPANY, LLC,
Plaintiff,

v.

COGENTRIX OF NORTH CAROLINA, INC.,
Defendant.

Entered April 15, 1998

MEMORANDUM AND ORDER

THIS MATTER is before the Court on the following motions and supporting or responsive memoranda:

1. Defendant's "Motion to Dismiss, Motion to Confirm, and Answer" (document #3) and "Memorandum of Law in Support." (document #4), both filed February 17, 1998;
2. Plaintiff's "Memorandum in Response to Cogentrix of North Carolina, Inc.'s Motion to Dismiss and Motion to Confirm" filed March 16, 1998 (document #10);
3. Defendant's "Memorandum of Law in Response to ANR's Prayer to Vacate and reply Memorandum in Support of Motion to Dismiss and Motion to Confirm" filed April 8, 1998 (document #23);
4. Plaintiff's "Motion for Continuance Pursuant to Rule 56(f)" (document #14) and "Memorandum in Support

of Motion for Continuance..." (document #15), both filed March 16, 1998; and

5. Defendant's "Memorandum in Response to Motion for Continuance..." filed April 8, 1998 (document #22).

All parties have had an opportunity to respond fully to each other's arguments on each pending motion, and have consented to Magistrate Judge jurisdiction under 28 U.S.C. §636(c); therefore, these matters are ripe for consideration by the Court.

Having carefully considered the parties' arguments, the record, and the applicable authority, the Court will deny Defendant's "Motion to Dismiss...[or] to Confirm"; will treat Plaintiff's Complaint as a motion to vacate, and will grant said motion; and will deny Plaintiff's Motion for Continuance.

I. PROCEDURAL AND FACTUAL BACKGROUND

On May 19, 1986, Defendant Cogentrix of North Carolina, Inc. ("Cogentrix") entered into a contract for the purchase of coal from Coastal Coal Sales, Inc. ("Coastal"), predecessor in interest to Plaintiff ANR Coal Company, LLC ("ANR"). Specifically, Coastal agreed to provide coal to Cogentrix as required for its Southport, North Carolina power generation facility. Sometime in the fall of 1996, Cogentrix significantly reduced its demand for coal pursuant to the Coal Sales Agreement, and Coastal accused Cogentrix of breaching the contract.

On October 15, 1996, Coastal sought arbitration of the parties' dispute under Section 7.01 of the contract, which provided as follows:

> A controversy or claim arising out of or related to this Agreement, except those as to price of coal purchased and sold pursuant to this Agreement or the validity of this Agreement, or as expressly excepted from arbitration pursuant to any provision hereof, shall be submitted to arbitration under the Commercial Arbitration Rules of the American Arbitration Association then in effect.

The Charlotte, North Carolina regional office of the American Arbitration Association ("AAA") coordinated the ensuing arbitration. Each party selected its own arbitrator, and the two selected were to pick a third from a list of "neutrals" provided by AAA. Throughout the selection process, Coastal complained that the list of neutrals was too heavily comprised of attorneys with ties to the utility industry, or coal purchasers, rather than coal suppliers like itself. Two neutrals with strong industry ties were stricken from the list and replaced -- as was one attorney whose firm had previously sued Cogentrix -- but AAA refused Coastal's request for an entirely new selection of proposed neutrals.

The parties used their preemptory strikes and each submitted their rankings of the remaining neutrals. Following his selection as the highest commonly ranked neutral, Mr. Wilburn Brewer disclosed that his law firm, Nexsen Pruet Jacobs & Pollard ("Nexsen Pruet"), (1) had represented Carolina Power & Light ("CP&L"), whose modification of its power supply contract with Cogentrix had directly caused the reduction in coal demand at the heart of this dispute, "in electrocution cases in South Carolina," and (2) in 1987 had merged briefly with Moore & Van Allen, presently counsel for Cogentrix. Although Mr. Brewer, due to illness, was not actively practicing law during that time, he had become personally acquainted with Jeff Davis, attorney for Cogentrix in the instant dispute. Mr. Brewer

further represented that these former and current relationships "would [not] in any way affect my impartiality or ability to fairly arbitrate this matter" and that he was "not aware of any other matters which should be disclosed."

Coastal was informed of this second disclosure in a letter dated January 8, 1997, and of both of these disclosures in a separate letter dated February 13, 1997; the parties were also advised in the second letter that a failure to object to Mr. Brewer by February 24, 1997 would "waive any presumption of bias by the Arbitrator based on this disclosure."[1] Coastal made no such objection, based on what it knew about Mr. Brewer at that time, prior to the scheduled arbitration.

An arbitration hearing was held from September 30 through October 3, 1997. On October 22, 1997, the panel issued an award denying Coastal's breach of contract claim and finding in favor of Cogentrix by a 2-1 vote, with Mr. Brewer's vote breaking the tie between the party-appointed arbitrators.

Only after losing the arbitration did Coastal discover that Mr. Brewer, the "neutral" arbitrator, had additional undisclosed ties to CP&L, Cogentrix, and Moore & Van Allen -- ties which would have influenced it to rank him lower on the list of neutrals, if not to challenge him for cause. Specifically, Coastal learned that Nexsen Pruet had represented CP&L in South Carolina in cases involving regulatory issues, not just the previously disclosed "electrocution cases;" that Moore & Van Allen had represented Cogentrix during the time that it was merged with Nexsen Pruet; and, in fact, that some Moore & Van Allen attorneys had previously had a financial interest in Cogentrix.

Coastal avers that if it had known any of these facts, which it correctly contends Mr. Brewer had an obligation to

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[1] The AAA also wrote in a January 28, 1997 letter, prior to Brewer's disclosure of his firm's former representation of CP&L, to "confirm [that] the Parties waived any presumption of bias by Mr. Brewer based on his disclosure."

disclose, it would have used a peremptory challenge to strike Mr. Brewer or would have ranked him lower on the list it submitted to AAA. Cogentrix conceded that Nexsen Pruet's representation of CP&L in South Carolina was more substantial than initially disclosed, but minimizes the Moore & Van Allen investment interest in Cogentrix, characterizing the latter as "loans" (secured by stock options) which were made by certain individual attorneys prior to the failed merger with Nexsen Pruet.

On January 20, 1998, ANR, Coastal's successor in interest, filed the instant action seeking an order vacating the Award and compelling a new arbitration of its claims. Cogentrix responded by filing the instant Motion to Dismiss or Confirm, whereby it seeks dismissal of Plaintiff's complaint and judicial confirmation of the arbitration award.

II. DISCUSSION OF CLAIMS

As an initial matter, Defendant Cogentrix claims that this Court lacks subject matter jurisdiction over this dispute, or that the Complaint fails to state a claim, because (a) the entire dispute is governed by the arbitration clause and (b) pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("the FAA"), ANR should have filed a Motion to Vacate, rather than a Complaint, in order to challenge the Award. These arguments are without merit, elevating form over substance.

Although the parties contracted to arbitrate any "controversy or claim arising out of or relating to" the Coal Sales Agreement, the pertinent contract provision does not mandate that disputes regarding the fairness or procedures *of the arbitration process* must themselves be determined by arbitration as well. Indeed, the Federal Arbitration Act expressly contemplates that a federal district court has jurisdiction over such requests to vacate an arbitration award. See 9 U.S.C. § 9 (court must confirm arbitration award "unless the award is vacated, modified, or corrected as

prescribed in sections 10 and 11) and § 10(a) ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration").

In its complaint, ANR requested "that an order be entered vacating the award." Although it is unnecessary to file a complaint to seek vacatur of an arbitration award under the FAA,[2] the Court will exercise its discretion to treat the Complaint filed herein as a motion to vacate. Since the parties have adequately briefed the salient issues, the Court may on the present record determine whether to vacate or confirm the arbitration award. See O.R. Securities v. Professional Planning Associates, Inc., 857 F.2d 742, 746 (11th Cir. 1988) (considering whether to vacate or confrim arbitration award in spite of Plaintiff's erroneous filing of a complaint). To dismiss Plaintiff's complaint on mere procedural grounds, or to fail to treat it as a motion to vacate because it was not accompanied by a supporting memorandum (as required, upon the filing a motion, by this district's Civil Justice Expense and Delay Reduction Plan, Section Three II. A.), would indeed "elevate form over substance."[3] See, e.g., Int'l Brotherhood of Electric Wkrs.

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[2] 9 U.S.C. § 6 provides that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."

[3] Defendant's argument that ANR was required to file advance notice of a motion to vacate is also incorrect. The Federal Arbitration Act, 9 U.S.C. §12, merely requires that motions to vacate be served on the opposing party within three months after the award is filed or delivered. Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986); Eagle Energy Inc. v. District 17, United Mine Workers of America, et al., --- F.R.D. ---, 1998 WL47159, *2 (S.D.W. Va. 1998); Real Color Displays Inc. v. Universal Applied Technologies Corp., 950 F.Supp. 714, 719 (E.D.N.C. 1997); Solomon v. Duke University, 850 F.Supp. 372, 373 (M.D.N.C. 1993). Nowhere does § 12 require separate filing of notice that such a motion is forthcoming.

No. 323 v. Coral Electric, 576 F.Supp. 1128, 1134 (S.D. Fla. 1983).

That said, the scope of the Court's review of an arbitration award is quite limited. Remmey v. Paine Webber Inc., 32 F.3d 143, 146 (4th Cir.), cert. denied, 513 U.S. 1112 (1995). In deference to the arbitration process, this Court may only consider whether the award should be confirmed or vacated upon one of the statutory grounds set forth in the FAA, namely:

> (1) Where the award was procured by corruption, fraud, or undue means.
> (2) Where there was *evident partiality* or corruption in the arbitrators, or either of them.
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(emphasis added).

Although Plaintiff cites several provisions in the statute, the gravamen of its motion is that Mr. Brewer, the "neutral" arbitrator on the panel, exhibited "evident partiality." The Plaintiff's argument is well taken. Indeed, as the Supreme Court held in Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147-48 (1968), an arbitrator's nondisclosure of facts showing a potential conflict of interest creates "evident partiality" warranting vacatur even when no actual bias is present. Facts which

might tend to show evident partiality, when not disclosed by a potential arbitrator, include those that "might create an impression of possible bias," show the "appearance of bias," or indicate that an arbitrator "might reasonable be thought biased against one litigant and favorable to another." Id., at 149-50

Applying this standard, the Fourth Circuit has held that to demonstrate evident partiality under the FAA, the party seeking vacatur must prove that "a reasonable person would have to conclude that an arbitrator was partial" to the other side. Consolidation Coal Co. v. Local 1643, United Mine Wkrs. of America, 48 F.3d 125, 129 (4th Cir. 1995), citing Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993)(internal citations omitted). In other words, the "reasonable person" standard adopted in Consolidation Coal requires a showing of more than mere "appearance of bias," but less than "proof of actual bias." Id., citing, Morelite Constr. Corp v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984). Rather, "[t]he alleged partiality must be 'direct, definite, and capable of demonstration rather than remote, uncertain or speculative." Id., citing, Peoples Sec., 991 F.2d at 146 (quoting Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992)).

The Fourth Circuit has adopted a four factor test for determining whether evident partiality results from an arbitrator's prior relationship with a party, whereby the Court must examine:

> (1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceeding;
> (2) the directness of the relationship between the arbitrator and the party he is alleged to favor;
> (3) the connection of the relationship to the arbitration; and

(4) the proximity in time between the relationship and the arbitration proceeding.

Consolidation Coal, 48 F.3d 125, 129, 130, citing Hobet Mining, Inc. v. International Union UMWA, 877 F.Supp. 1011, 1021 (S.D.W.Va. 1994).

Moreover, federal courts have often found grounds for vacatur when an arbitrator fails to fully comply with disclosure requirements imposed on him by an applicable arbitration rule or code. See, e.g., Health Services Management, supra. 975 F.2d at 1260 (vacating award because AAA violated its own disclosure rules by failing to inform the parties of information regarding neutral arbitrator's potential conflicts); Schmitz v. Zilveti, 20 F.3d 1043, 1048-49 (9th Cir. 1994)(vacating award based on arbitrator's violation of National Association of Securities Dealers Code § 23 requiring full disclosure of, and an affirmative duty to investigate, potential conflicts); Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159-60 (8th Cir. 1995)(same); and Rogers v. Schering Corp., 165 F.Supp. 295, 301 (D.C.N.J.), aff'd 271 F.2d 266 (1959) (vacating award under § 10(a) for AAA's failure to disclose potential conflicts of replacement arbitrator).

In the instant case, only *after* being selected as the third arbitrator, Mr. Brewer disclosed that other lawyers in his firm had, "in electrocution cases," represented CP&L, an entity significantly related to Cogentrix in this matter (as discussed above); that he had not personally represented CP&L; and that CP&L was not a "dominant client" of the firm. In fact, Mr. Brewer's firm was counsel of record for CP&L in two reported appellate cases regarding the company's right to deliver electric service. See Carolina Power & Light v. Town of Pageland, 321 S.C. 538, 471 S.E.2d 137 (S.C. 1996); Carolina Power & Light Company

v. City of Bennettsville, 314 S.C. 137, 442 S.E.2d 177 (S.C. 1994).[4]

Moreover, Brewer also at this time--again, after his selection-- disclosed that in 1987-1988, his firm had briefly merged with Moore & Van Allen, the firm representing Cogentrix, and that he was acquainted with Jeff Davis, Cogentrix's counsel, as a result. However, he failed to disclose that during this very time period, the consolidated firm had represented Cogentrix, or that a number of Moore & Van Allen attorneys, just prior to the merger, had loaned a substantial sum of money to Cogentrix in exchange for stock options in the company. Plaintiff reasonably asserts that had it known these clearly material facts, it would have used a peremptory challenge to strike Brewer as the neutral, and/or would have objected to him for cause following his selection.

These undisclosed facts regarding the interrelationship of Mr. Brewer's firm, CP&L, Cogentrix, and Moore & Van Allen, may or may not be sufficient to show actual bias, but they would certainly cause a reasonable person to question Mr. Brewer's impartiality. At best, the withholding of these details about Nexsen Pruet's representation of CP&L, its merger attempt with Moore & Van Allen, and the individual Moore & Van Allen's attorneys' financial arrangements with Cogentrix was a violation of Mr. Brewer's duty to disclose all information regarding his present and past relations with Cogentrix and other potentially interested parties; Brewer was aware of CP&L's involvement in the case, and for some reasons inaccurately or incompletely disclosed the nature of his firm's representation of the company.

The potential bias is readily demonstratable, for a reasonable person might conclude that Mr. Brewer might be inclined to rule in favor of Cogentrix so that the

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[4] Brewer's inaccurate disclosure raises the possibility, if not the likelihood, that his firm has represented CP&L in other matters and cases which have not resulted in reported decisions.

consequences of the company's alleged breach would not be passed on to his firm's significant client, CP&L, whose decrease in power needs essentially caused the alleged breach. Put simply, there are sufficient "red flags" regarding Mr. Brewer's relationship with CP&L, Moore & Van Allen, & Cogentrix to suggest that Coastal, if fully informed, would have used a peremptory challenge to strike him, ranked him lower on its approved list of neutrals, and/or challenged him for cause if he had nevertheless been selected.

Because the facts establishing evident partiality have been adequately averred in the affidavits provided by counsel, there is no need to conduct further discovery in this case, and therefore Plaintiff's "Motion for Continuance..." will be denied. See O.R. Securities, 857 F.2d at 746 n.3 (no abuse of discretion for court to rule on motion to vacate without allowing parties to conduct discovery or a hearing), citing Fed. R. Civ. P. 43(e) (motions may be decided on affidavits) and Rule 78 (court may decide motions on written statements of reasons in support and opposition).

III. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Defendant's "Motion to Dismiss [and] Motion to Confirm" (document #3) are **DENIED**;
2. Plaintiff's "Motion to Vacate" (as contained in documents #1 and #10) is **GRANTED**, and this matter is **REMANDED** to the American Arbitration Association for the appointment of arbitrators, including a neutral arbitrator, and further proceedings not inconsistent with this opinion;
3. Plaintiff's "Motion for Continuance Pursuant to Rule 56(f)" (document #14) is **DENIED**; and
4. The Clerk is directed to send copies of this Memorandum and Order to counsel for the parties.

SO ORDERED, this 15th day of April, 1998.

/s/ Carl Horn
CARL HORN
Chief U.S. Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1753
CA-98-19-3-H

ANR COAL COMPANY, INCORPORATED
Plaintiff - Appellee

v.

COGENTRIX OF NORTH CAROLINA, INCORPORATED
Defendant - Appellant

FILED: April 27, 1999
ENTERED: April 27, 1999

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that is should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO. 3:98CV19-H

ANR COAL COMPANY, LLC,
Plaintiff,

v.

COGENTRIX OF NORTH CAROLINA, INC.,
Defendant.

Entered: July 7, 1999

ORDER

THIS MATTER is before the Court on Plaintiff ANR's "Motion to Vacate Judgment" (document #37) and "Memorandum In Support Of Motion To Vacate Judgment" (document #38), both filed June 14, 1999. The Defendant's "Response In Opposition To Motion To Vacate" (doucument #39) was filed June 28, 1999.

In support of its motion the Plaintiff shows the Court that it "had no opportunity to object to the form or entry of the Judgment prior to its entry"; that it "currently intends to file a Petition for Writ of Certiorari"; and that it believes it "inappropriate" to enter judgment until its time for filing a Petition for Certiorari has expired and the Supreme Court has made a decision on the Petition. The Plaintiff cites no statute or case in support of its argument.

The Plaintiff also argues in support of its motion that the Judgment "goes beyond the relief mandated by the Fourth Circuit" and submits "a proposed judgment which follows the Fourth Circuit's mandate, and which preserves any further rights of appeal."

In its Response In Opposition To Motion To Vacate, the Defendants respond that the Judgment entered was consistent with the mandate of the Fourth Circuit; and that there is no ground for vacating the judgment in Fed. R. Civ. P. 60(b)(1).

Regarding the Plaintiff's legally unsupported contention that judgment should not be entered until after no petition for certiorari is filed or, if filed, the Supreme Court rules, the Defendant cites Harris v. The City of Virignia Beach, 923 F. Supp. 869 (E.D. Va. 1996), rev'd on other grounds, 110 F. 3d 59 (4th Cir. 1997); and 28 U.S.C. §2101(f).

As the Defendant further notes, objections to the form of the Judgment are not clearly set forth in Plaintiff's Motion To Vacate. By comparing the proposed Judgment to the one actually entered following the Fourth Circuit mandate, however, one can reasonably conclude that the Plaintiff objects to confirmation of the Arbitration award, dismissal of the complaint, and/or denial of the Plaintiff's motion to vacate the award.

The undersigned initially found Plaintiff's motion to vacate meritorious and, indeed, continues to believe that the arbitration award should be vacated. The undersigned believes, in fact, that the panel of the Fourth Circuit wrongly decided this case on appeal. However, the Fourth Circuit is the higher court and has issued its mandate. This Court, however much it may disagree, has no choice but to follow that mandate. See, e.g., United States v. Bell, 5 F. 3d 64, 66-67 (4th Cir. 1993)(Fourth Circuit taking a trial court to the proverbial woodshed for failing to follow its mandate).

On the other hand, the Defendant is incorrect in assuming that Harris governs this motion - - because here, unlike in Harris, the Plaintiff is asking a trial court to reconsider its own Judgment entered after an appellate mandate. And, while the undersigned agrees that there is no basis for vacating or setting aside its judgment pursuant to Rule 60(b)(1), it is within this Court's power - - as set forth

in the statute cited by the Defendant - - to stay its judgment "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." 28 U.S.C. §2102(f)(1999).

In Summary and conclusion, the undersigned will deny Plaintiff's motion to the extent it asks for the Judgment which has been entered to be set aside or substituted, but will stay enforcement of the Judgment which was entered until the later of the time for filing a petition for certiorari to the U.S. Supreme Court has expired or, if filed, the Supreme Court has ruled.

NOW THEREFORE, IT IS ORDERED:

1. The Plaintiff's "Motion To Vacate Judgment" filed June 14, 1999 (document #37) is **DENIED**; the Judgment entered June 3, 1999 remains in effect unless or until it is reversed on appeal.

2. Provided, however, enforcement of the Judgment entered June 3, 1999 is **STAYED** until the later of the time for filing a petition for certiorari to the U.S. Supreme Court has expired or, if filed, until the Supreme Court has ruled.

3. The Clerk is directed to send copies of this Order to counsel for the parties.

SO ORDERED, this 7th day of July, 1999.

/s/ Carl Horn
CARL HORN
Chief U.S. Magistrate Judge

United States District Court
for the
Western District of North Carolina
July 7, 1999

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:98-cv-00019

True and correct copies of the attached were mailed by the clerk to the following:

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cc:

Judge	( )
Magistrate Judge	( )
U.S. Marshal	( )
Probation	( )
U.S. Attorney	( )
Atty. for Deft.	( )
Defendant	( )
Warden	( )
Bureau of Prisons	( )
Court Reporter	( )
Courtroom Deputy	( )
Orig-Security	( )
Bankruptcy Clerk's Ofc.	( )
Other_____	( )

Date: 7/7/99

Frank G. Johns, Clerk

By: /s/_____
Deputy Clerk

Supreme Court, U.S.
FILED
AUG 20 1999
OFFICE OF THE CLERK

No. 99-196

IN THE
Supreme Court of the United States

ANR COAL COMPANY, INC.,
Petitioner,

v.

COGENTRIX OF NORTH CAROLINA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals correctly hold that an arbitrator's nondisclosure of "trivial" matters did not violate the procedural rules governing the arbitration, nor establish "evident partiality" within the meaning of 9 U.S.C. § 10(a)(2)?

LIST PURSUANT TO RULE 29.6

Respondent is not a publicly-held corporation. Respondent is an indirectly wholly-owned subsidiary of Cogentrix Energy, Inc., which is not a publicly-held corporation. No publicly-held company owns 10% or more of respondent's stock.

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IN THE

Supreme Court of the United States

No. 99-196

ANR COAL COMPANY, INC.,
Petitioner,

v.

COGENTRIX OF NORTH CAROLINA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT

Petitioner through its predecessor in interest contracted in 1986 to supply coal requirements for ten years to respondent, a company generating and selling electricity. In the tenth year of the contract a dispute arose as to the amount of coal respondent was required to purchase. Petitioner filed a demand for arbitration with the American Arbitration Association (AAA), pursuant to a provision of the contract that non-price disputes "shall be submitted to arbitration under the Commercial Arbitration Rules of the American Arbitration Association" and that "[t]he award of the arbitrators shall be conclusive and binding upon the parties and shall be specifically enforceable by any court having jurisdiction over either party by

the entry of judgment upon the award." C.A. App. 73.[1] Each party was permitted to pick one of a panel of three arbitrators, with the third or "neutral" arbitrator to be selected by the other two arbitrators from a list of candidates provided by the AAA.

A. Disclosures by the Neutral Arbitrator.

In accordance with its Commercial Arbitration Rules, the AAA provided the two parties with a list of candidates for neutral arbitrator, accompanied with brief curricula vitae as to each. One of those on the final list was Wilburn Brewer, Jr., of the Columbia, South Carolina firm of Nexsen Pruet Jacobs & Pollard, LLP. Prior to his selection, in response to an objection from petitioner that he and another candidate should be removed from the list because they had represented power companies, the AAA denied the objection, explaining to the parties:

> "I was advised by Mr. Brewer that he has never personally represented Duke Power or CP&L. Mr. Brewer is aware that his firm does a few workers comp cases for Duke Power and any electrocution cases for CP&L, which are sporadically filed."

C.A. App. 128.[2]

After the parties exercised their peremptory challenges, Mr. Brewer received the highest combined ranking by the two parties of the candidates remaining, and in January

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[1] Citations to "C.A. App." are to the appendix filed in the Court of Appeals; to "Pet." to the petition for certiorari; and to "P.C.A." to the appendix to the petition.

[2] Carolina Power & Light (CP&L) was the principal electricity customer of respondent and a potential witness, but was not a party to the arbitration. Two candidates on the original list had been deleted by the AAA based on their being CP&L's general counsel and former associate counsel; a third was removed because his law firm had filed a suit against respondent.

1997 was selected neutral arbitrator. Under AAA Commercial Arbitration Rule 19, upon being selected he was required to disclose "any circumstance likely to affect impartiality," and any party thereupon could object to his serving. Upon selection he accordingly disclosed that ten years earlier

> "In 1987, his firm merged with Moore & Van Allen [counsel for respondent] and then separated in 1988. During 1988, Mr. Brewer was ill with leukemia and not actively practicing law or involved with the firm. Through this temporary merger, Mr. Brewer knows Mr. Davis [counsel for respondent]."

C.A. App. 130. Although specifically invited by the AAA to challenge him for cause, *id.*, petitioner declined to do so, *id.* 131. Later the same month Mr. Brewer submitted as a further disclosure a signed statement that:

> "I understand that somehow Duke Power Company and/or Carolina Power and Light Company may be remotely connected with this matter. Other lawyers in my firm have represented CP&L in electrocution cases in South Carolina, and other lawyers in my firm have represented Duke Power Company in workers' compensation cases and in tax cases in South Carolina. I have not personally represented either company. All of our clients are important, but neither of these companies are dominant clients in our firm.
>
> "In 1987, Nexsen Pruet Jacobs & Pollard [Mr. Brewer's firm] merged with Moore and Van Allen of North Carolina [counsel for respondent]. The merger lasted approximately one year, and the entire Nexsen Pruet firm withdrew and reconstituted its practice as Nexsen Pruet. During most of that time, I was ill with leukemia and not actively practicing. As a

result of that relationship, I know Jeff Davis who represents Cogentrix.

"I am confident that neither of the above disclosures would in any way affect my impartiality or ability to fairly arbitrate this matter. I am not aware of any other matters which should be disclosed."

Id. 134. Again, petitioner was invited to object, but declined. *Id.* 133. Petitioner's counsel later explained:

"Given there was no assurance that the challenge would be granted and that a failed challenge could potentially offend the 'neutral' arbitrator as a challenge to his integrity, ANR believed it risky to make the challenge."

Id. 36; see also *id.* 53 n.10; *id.* 152.

After hearing testimony and receiving documentary evidence, the panel of arbitrators ruled 2-1 in favor of respondent, wtih Mr. Brewer in the majority.

B. Petitioner's Complaint.

After losing the arbitration, petitioner filed a civil action in the United States District Court for the Western District of North Carolina praying to have the award vacated.[3] Respondent moved to have the award confirmed. Petitioner stated that at some undisclosed time it had learned of additional matters it argued Mr. Brewer should have disclosed, and urged that his failure to have done so required vacating the arbitration ruling. These were:

1. During the brief unsuccessful merger ten years previously between Mr. Brewer's firm and respondent's

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[3] The Court of Appeals held that under the statute, 9 U.S.C. § 12, "ANR clearly erred by labeling its pleading a civil complaint, rather than a motion to vacate," but that the error was not prejudicial. P.C.A. 5 n.1.

(which had been disclosed), while Mr. Brewer was ill with leukemia and not practicing, some of the latter firm's attorneys held warrants to purchase respondent's stock, and the merged firm had represented respondent.

2. In addition to electrocution cases (which had been disclosed), petitioner now cited two cases reported respectively in 1994 and 1996 involving service disputes in which Mr. Brewer's firm (but not Mr. Brewer personally) had represented Carolina Power & Light.

Petitioner did not allege that Mr. Brewer had been aware of these facts.[4] Nor did petitioner explain why it "first became aware of," C.A. App. 157, the two previously-reported non-electrocution cases only after losing the arbitration.

C. The District Court's Decision.

By consent of the parties, petitioner's complaint was submitted for decision to a magistrate judge. Without any hearings or oral argument, the magistrate issued an opinion vacating the arbitration decision on the ground that the record established "evident partiality" by Mr. Brewer within the meaning of 9 U.S.C. § 10(a)(2). P.C.A. 27.

The magistrate judge based his ruling on what he called "Mr. Brewer's duty to disclose *all* information regarding his present and past relations with Cogentrix and other potentially interested parties." *Id.* 26 (emphasis supplied). Mr. Brewer violated that duty, the magistrate judge said, by not disclosing what the magistrate judge characterized as "details," *id.*: warrants held ten years previously by some lawyers during the brief law-firm merger, representation of respondent during the merger, and the two reported non-electrocution cases. The magistrate

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[4] Mr. Brewer's statement in his disclosure memorandum that "I am not aware of any other matters which should be disclosed," C.A. App. 134, was not contradicted.

judge reasoned that had petitioner known these additional facts, it might have exercised its peremptory challenges differently or ranked the candidates differently. *Id.* 27. He did not address specifically AAA Rule 19, which requires disclosure of potential conflicts only *after* peremptory challenges and rankings have been completed and a candidate selected. Respondent appealed.

D. The Court of Appeals' Decision.

On appeal, the Fourth Circuit reversed, in an opinion by Judge Motz, joined by Judges Ervin and Traxler. The Court of Appeals held that the magistrate judge had erred in concluding that 9 U.S.C. § 10(a)(2) imposed a duty on arbitrators to disclose "all information," however outdated or trivial. The Court of Appeals held that "evident partiality" under 9 U.S.C. § 10(a)(2) was not established by "[f]ailure to disclose the sort of attenuated, nonsubstantial relationships at issue here." P.C.A. 9.

The Court of Appeals also rejected petitioner's argument that the AAA Commercial Arbitration Rules had been violated and that such violation required reversal. Failure to disclose such insubstantial matters, it held, did not violate AAA Rule 19. Moreover, the standard for judicial reversal, the court explained, was not the AAA rules, but rather the statutory one of "evident partiality."

The Court of Appeals then engaged in a detailed examination of the additional facts petitioner argued were required to have been disclosed. Applying an established four-factor test,[5] the court concluded that as to the existence of two non-electrocution cases, (1) no personal interest of Mr. Brewer in the arbitration had been shown; (2) he had no direct relationship with the parties or the

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[5] See, *e.g.*, *Consolidation Coal Co.* v. *Local 1643*, 48 F.3d 125, 130 (4th Cir. 1995).

arbitration; and (3) "the 'connection' between Brewer and Cogentrix is virtually nonexistent," and that therefore (4) proximity in time was "of little significance." P.C.A. 14. As to the merged firm's representation of Cogentrix in 1988 and the warrants held personally by some lawyers, the court reached the same conclusion as to the first two factors, noted that there was a "remote" connection to a party to the arbitration, but that "it is difficult to understand how the facts of this case demonstrate any 'personal interest' on Brewer's part, let alone one that is direct and proximate in time to the arbitration." *Id.* 15. Summarizing the record, the Court of Appeals held:

> "ANR has not carried its burden of proffering facts that, alone or taken together, would permit a reasonable person to assume that Brewer was partial to Cogentrix. A trivial relationship, even if undisclosed, will not justify vacatur of an arbitration award."

Id. 15-16. Rehearing and rehearing *en banc* were denied. *Id.* 29.

REASONS FOR DENYING THE WRIT

The petition's principal argument is that any noncompliance with the disclosure rules governing an arbitration should *per se* require a federal district court to vacate the arbitration award. Pet. 10, 12. Even if that proposition were correct—which it is not—it has no application to this case. For, as the Court of Appeals explained, the "trivial" matters complained of here were so insubstantial that the AAA Rules did not require their disclosure. Thus the initial premise of the petition—that a disclosure rule was violated here—is simply incorrect.

Moreover, as the Court of Appeals also correctly ruled, judicial authority to vacate an arbitration award must be found in 9 U.S.C. § 10(a). In this case, where the arbi-

trator made extensive disclosures, the failure to include insignificant additional facts (of which there was no evidence the arbitrator had even been aware) did not remotely meet the statutory standard of "evident partiality" under 9 U.S.C. § 10(a)(2), which was the authority relied on by the magistrate judge to vacate the arbitration award.

The Fourth Circuit's well-reasoned analysis of the record and of the governing statute and case law fully explains why the magistrate judge's ruling that "evident partiality" had been established was in error. The Fourth Circuit's opinion applies well-settled principles to a particular set of facts. It makes no new law, and is fully in accord with decisions of this Court and of other federal circuits.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THERE WAS NO VIOLATION OF 9 U.S.C. § 10(a)(2) NOR OF THE APPLICABLE ARBITRATION RULES.

Petitioner argues that noncompliance with the procedural rules governing an arbitration "requires vacation of the resulting arbitration award." Pet. 10 (capitalization omitted). No case has ever so held, and that argument is both mistaken and inapplicable to this case.

1. First of all, the petition's opening assertion—that it is a "fact that the arbitrator in this case was selected in violation of the parties' contractually agreed upon procedures," Pet. 4—is simply incorrect. As the Fourth Circuit explained and emphasized, no violation of the rules governing this arbitration occurred:

> "Failure to disclose the sort of attenuated, nonsubstantial relationships at issue here violates neither the teaching of *Commonwealth Coatings* nor AAA Rule 19."

P.C.A. 9. Because no arbitration rule was violated, petitioner's first argument—that such a violation should require vacating without regard to the standards of 9 U.S.C. § 10—raises a point that is not only unsupported in law, but in this case is entirely hypothetical.

Although the petition repeatedly asserts "violations of the governing AAA procedural rules," Pet. 10, notably it never quotes them. The applicable rule, AAA Commercial Arbitration Rule 19, provides:

> "Any person *appointed* as neutral arbitrator shall disclose to the AAA any circumstance *likely to affect impartiality,* including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Upon *objection of a party to the continued service* of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive."

(Emphasis supplied.) Rule 19 thus does not require, as the magistrate judge (who did not cite the rule) believed, disclosure of "all information regarding his present and past relations." P.C.A. 26. Rather, the rule requires disclosure only of circumstances "likely to affect impartiality." And when the magistrate judge emphasized that nondisclosure prior to selection might have affected petitioner's peremptory challenges, *id.* 26-27, he misunderstood what the rule requires. The text of Rule 19 makes clear that disclosures are not required to be made until *after* the arbitrator is "appointed." At that time parties may raise objections for cause "to the continued service"

of the arbitrator. Oblivious to the language of the rule, petitioner repeatedly complains that had disclosure been made, it might have exercised a peremptory challenge against Mr. Brewer. See Pet. 6 ("ANR would have struck Brewer with one of its peremptory strikes"), 8 ("effect that the inadequate and untimely disclosures had on ANR's right to exercise peremptory strikes"), 9 ("ANR reasonably would have exercised a peremptory challenge"). But all of that is utterly beside the point. Under Rule 19, peremptory challenges come first, then disclosures.[6] While claiming a violation of the AAA rules, petitioner really is complaining about the procedure established by the rules themselves.

2. Secondly, for the reasons the Fourth Circuit carefully set forth, the case is governed by federal statute. The Federal Arbitration Act does not confer on federal district courts a general authority to review arbitration results for error, substantive or procedural. Rather, by statute the judicial role is narrowly circumscribed. Arbitration results may be overturned only on one of four statutorily prescribed grounds:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence

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[6] The petition misleads in complaining that at the time peremptory challenges were made, Mr. Brewer "had not disclosed" the brief merger of the two law firms ten years earlier. Pet. 6. As soon as he was appointed and required to make disclosure by Rule 19, the merger was immediately, in fact twice, fully disclosed. C.A. App. 130, 134. Indeed, he and other candidates made some disclosures regarding CP&L in response to specific questions of the AAA even before the rules required. C.A. App. 128.

> pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Of those four statutory grounds, only the second, "evident partiality," was relied on by the magistrate judge. His ruling was not based upon any evidentiary hearing; it was simply a ruling as a matter of law, entered without even oral argument by counsel. The Fourth Circuit, having examined the same record, had ample reason to conclude that on this record the magistrate judge had misapplied the statute, and that the additional matters the magistrate held should have been disclosed did not establish "evident partiality." The Court of Appeals' analysis of that undisputed record was thorough, reflects common sense, and is surely correct; in any event, no retracing of those details by this Court is required.

II. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner claims a conflict with two decisions of this Court which hold that arbitration contracts are to be enforced according to their terms. *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Volt Information Sciences, Inc.* v. *Board of Trustees*, 489 U.S. 468 (1989). Neither case addressed the "evident partiality" standard prescribed in 9 U.S.C. § 10(a)(2).

Petitioner urges that under *Mastrobuono*, "the Fourth Circuit should have (1) determined the rules the parties' arbitration agreement imposed upon the arbitrator selection process; (2) determined if the rules had been followed;

and (3) if the rules have not been followed, vacated the award . . . ." Pet. 12. But the Fourth Circuit performed exactly such an analysis. It determined (1) that the arbitration agreement incorporated AAA Commercial Arbitration Rule 19; and (2) that on this record no violation of Rule 19 or of the arbitration agreement had occurred. See P.C.A. 6-7, 9. This Court need not review the correctness of that determination.

Petitioner also asserts a conflict with *Commonwealth Coatings Corp.* v. *Continental Cas. Co.*, 393 U.S. 145 (1968). In that case, unlike this one, an arbitrator had failed to disclose what this Court called a "repeated and significant" longstanding business relationship between the arbitrator and one of the parties to the arbitration. 393 U.S. at 146. This Court held that

> "We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another."

Id. at 150. Therefore disclosure should be made of "any dealings that might create an impression of possible bias." *Id.* at 149. In substantially the same formulation, the Fourth Circuit here held:

> "A party need not prove that the arbitrator, in fact, had improper motives. To do so would make the standard for evident partiality equivalent to proving actual bias. . . . But a party seeking vacatur must put forward facts that *objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives."

P.C.A. 12 (emphasis in original). On the facts of this case, it held, "ANR has not carried its burden." *Id.* 15; see *id.* 7-9.

Moreover, the *Commonwealth Coatings* opinion was further explained by Justices White and Marshall, who were essential members of the majority, and who emphasized that an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." 393 U.S. at 151 (White, J., joined by Marshall, J., concurring).[7] They added—in words exactly fitting the present case—"it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award." *Id.* at 152. The Fourth Circuit here did exactly that: it examined the record, found the undisclosed relationships to be insubstantial, and correctly reinstated the arbitration award.

III. THERE IS NO CONFLICT WITH OTHER CIRCUITS.

Petitioner's assertion of a conflict among the Circuits is fully refuted in the Fourth Circuit's opinion, P.C.A. 10-11, which the petition leaves unaddressed. The Fourth Circuit pointed out that the cases petitioner cites all involved nondisclosures of matters so consequential, as in *Commonwealth Coatings*, that on those facts and the entire records of those cases evident partiality could be inferred. See *Olson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157 (8th Cir. 1995); *Schmitz* v. *Zilveti*, 20 F.3d 1043 (9th Cir. 1994).[8] These were not, as the petition mistakenly asserts, rulings vacating *per se* simply for arbitrators' non-compliance with disclosure

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[7] The significance of Justice White's opinion in *Commonwealth Coatings* has frequently been noted. See P.C.A. 9 n.3 and cases there cited.

[8] *Rogers* v. *Schering Corp.*, 165 F. Supp. 295 (D.N.J. 1958), *aff'd*, 271 F.2d 266 (3d Cir. 1959), a much earlier district-court opinion, as the Fourth Circuit pointed out involved violation by the AAA of its own rules. See P.C.A. 10.

rules. See Pet. 16. Petitioner has cited no case holding nondisclosure by an arbitrator of such "trivial" facts established "evident partiality" under 9 U.S.C. § 10(a)(2).

CONCLUSION

For the reasons stated, certiorari should be denied.

Respectfully submitted,

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No. 99-196

In The Supreme Court of the United States

ANR COAL COMPANY, INCORPORATED,
Petitioner,

v.

COGENTRIX OF NORTH CAROLINA, INCORPORATED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY TO BRIEF IN OPPOSITION

I. COGENTRIX'S DISCUSSION OF THE MERITS OF THE CASE DOES NOT ELIMINATE THE CONFLICT BETWEEN THE FOURTH CIRCUIT'S OPINION AND THIS COURT'S OPINIONS IN *MASTROBUONO*, *VOLT*, AND *COMMONWEALTH COATINGS* OR OPINIONS FROM OTHER CIRCUITS.

In the Brief in Opposition filed by Cogentrix of North Carolina, Inc. ("Cogentrix"), Cogentrix primarily discusses the merits of the case, rather than directly responding to the policy reasons outlined by ANR Coal Company, Inc. ("ANR") for granting the Petition for Writ of Certiorari (the "Petition"). By discussing the merits, Cogentrix does not eliminate the conflict between the Fourth Circuit's opinion and this Court's precedents or opinions from other circuits.

Cogentrix seeks to distinguish *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) and *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989) by simply stating that those cases do not address the "evident partiality" ground under the Federal Arbitration Act (the "FAA"). Brief in Opposition at 11. Nonetheless, Cogentrix does not dispute in its Brief in Opposition that ANR sought vacatur of the arbitration award under multiple grounds under section 10 of the FAA, or that *Mastrobuono* implicitly recognizes that a violation of the right to have an arbitration agreement enforced according to its terms is properly remedied under the FAA by vacating the award entered in disregard of the parties' agreement. *See* Petition at 11. Nor does Cogentrix dispute that *Volt* holds that the obligation to enforce agreements to arbitrate extends specifically to the enforcement of agreed upon procedural rules. *See id.*

Cogentrix cannot reconcile the principles established in *Mastrobuono* and *Volt* with the holding in the Fourth Circuit's opinion that a violation of the parties' agreed procedural rules "would not, by itself, require or even permit a court to nullify an arbitration award." Appendix to the Petition ("A.") at 9. Rather, the Fourth Circuit held that the arbitration award could be set aside only on a further showing sufficient to support a finding of bias and improper motives. A. at 12; *see also* Brief in Opposition at 12.

Further, Cogentrix does not reconcile the Fourth Circuit's opinion with this Court's holding in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). Cogentrix only focuses on the analysis in *Commonwealth Coatings* of what disclosures are required by an arbitrator when disclosure obligations are not otherwise defined. That analysis is irrelevant to this case because Brewer's disclosure obligations were defined by the AAA's rules and procedures and the AAA's express request for information in ruling on ANR's challenge for cause.

Cogentrix ignores the aspects of the *Commonwealth Coatings* holding that are in direct conflict with the opinion of the Fourth Circuit. The *Commonwealth Coatings* Court held that an arbitration award is appropriately vacated if an arbitrator violates a disclosure obligation, whether or not there is a sufficient showing to support a finding of bias or improper motives. *Id.* at 147, 149-50, 151-52. In fact, in *Commonwealth Coatings*, there was an express finding by the district court that the arbitrator was "entirely fair and impartial." *Id.* at 151 n."t." In direct contrast, the Fourth Circuit held that, notwithstanding a violation of a disclosure obligation, an arbitration award could only be vacated upon a further showing sufficient to support a finding of bias and improper motives. A. at 12.

Cogentrix's attempt to reconcile the Fourth Circuit's opinion with the decisions of other circuits likewise fails. Cogentrix merely borrows the Fourth Circuit's

characterization of the cited cases without dealing with what those courts actually did in those cases. According to Cogentrix, in the cited cases, the nondisclosures were so consequential that "evident partiality could be inferred." Brief in Opposition at 13. But under the Fourth Circuit's test, evident partiality can be inferred only if there is a sufficient showing to support a finding of bias and improper motives. A. at 12.

In *Schmitz v. Zilveti*, 20 F.3d 1043, 1048-49 (9th Cir. 1994), one of the cited cases, there was no evidence that the arbitrator knew the information he failed to disclose, and accordingly, there could not have been a showing sufficient to support a finding of bias or improper motives. Rather, the court found that the arbitrator failed to fulfill his obligations imposed pursuant to the parties' agreement to arbitrate, and that provided sufficient grounds to vacate the arbitration award. *Id.* In *Rogers v. Schering Corp.*, 165 F. Supp. 295 (D.N.J. 1958), *aff'd*, 271 F.2d 266 (3rd Cir. 1959), the arbitrator made the required disclosures to the AAA, but the AAA failed to forward the information to the parties. There could have been no showing of improper motives, given that the arbitrator had made disclosure, but the court vacated the award based on the violation of the parties' agreed procedural rules. *Id.* at 302-03.

Given that the Fourth Circuit opinion is in conflict with this Court's precedents and opinions from other circuits on these critical issues dealing with the parties' right to insist on enforcement of their agreed procedural rules in arbitration, this Court should grant ANR's Petition for Writ of Certiorari.

II. ON THE MERITS, THE ARBITRATOR IN THIS CASE VIOLATED HIS DISCLOSURE OBLIGATIONS AND THE ARBITRATION AWARD WAS PROPERLY SET ASIDE BY THE DISTRICT COURT.

Although a discussion of the merits of this case seems more appropriately deferred until after a grant of the Petition, ANR will briefly address some of the issues raised in the Brief in Opposition.

Cogentrix's primary contention in its Brief in Opposition is that the Fourth Circuit appropriately applied the four-part test of *Consolidation Coal Co. v. Local 1643*, 48 F.3d 125, 130 (4th Cir. 1995), and correctly concluded that the undisclosed information was "trivial" and need not be disclosed. However, the purpose of the *Consolidation Coal* analysis is to determine the parameters of an otherwise undefined disclosure obligation. Accordingly, such an analysis was unnecessary in this case because the disclosure obligation had been defined by the AAA's express inquiry of Brewer to disclose the extent of his firm's representation of Carolina Power & Light ("CP&L"). In its opinion, the Fourth Circuit did not acknowledge the AAA's inquiry to Brewer.

The parties agreed that the AAA would rule on any challenges for cause. Cogentrix acknowledges in its Brief in Opposition that the AAA granted challenges for cause, two of which were based on prior relationships with CP&L. Brief in Opposition at 2 n.2. Further, Cogentrix does not dispute that Brewer was challenged for cause, and that, in response to that challenge, Brewer was asked to disclose the extent of his firm's representation of CP&L. Accordingly, Brewer had a disclosure obligation based on the AAA's express request, which the Fourth Circuit simply ignored in its opinion.

Cogentrix throws out a red herring in its Brief in Opposition when it suggests that a violation of Brewer's disclosure obligations would not have affected ANR's peremptory challenges because Rule 19 only requires disclosure after an arbitrator's selection. In this case, Brewer's primary disclosure violation was his failure to disclose information expressly requested by the AAA in ruling on ANR's challenge for cause, in addition to his violations of Rule 19. The AAA's express request for information occurred prior to ANR's exercise of its peremptory challenges and rankings. Brewer's incomplete disclosures were misleading, and thus Brewer's violation of that disclosure obligation adversely affected ANR's ability to exercise properly informed peremptory challenges and rankings. Even now, the full extent of Brewer's firm's representation of CP&L is unknown. A. at 26 n.4.

Although Cogentrix touts that the Fourth Circuit performed a thorough review of the record, and that its analysis is "surely correct," the district court performed the same thorough review of the same record. The district court concluded that the arbitration award should be vacated. A. at 27. Even after the Fourth Circuit rendered its opinion, the district court affirmed its belief that the Fourth Circuit wrongly decided this case on appeal. A. at 31.

Brewer violated his disclosure obligations which in turn affected the AAA's ability to rule on ANR's challenge for cause and ANR's ability to exercise its peremptory challenges and rankings. Pursuant to the authorities cited in the Petition, the appropriate remedy under the FAA was vacatur of the arbitration award without any further required showing to support a finding of bias or improper motives. This Court should grant the Petition to correct the Fourth Circuit opinion which holds to the contrary.

CONCLUSION

For the reasons outlined herein and previously submitted to the Court, ANR respectfully requests the Court to grant its Petition for Writ of Certiorari.

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